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November 10, 1997

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FEDERAL COMMUNICATIONS COMMISSION
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BY HAND

William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

Re: In re Applications of Policy and Rules Concerning the Interstate Interexchange Marketplace; Implementation of Section 254(g) of the Communications Act of 1934, as Amended; CC Docket No. 96-61

Dear Mr. Caton:

Please find enclosed for filing in the above-referenced proceeding, the original and nine copies, together with three microfiche copies, of the Reply Comments of Southwestern Bell Mobile Systems, Inc.

I have enclosed an additional copy of this filing to be file-stamped and returned to my legal assistant.

Please direct all questions and correspondence regarding this matter to me. Thank you for your assistance.

Sincerely yours,

Patrick J. Grant

Enclosures

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

ORIGINAL

In the Matter of	
Policy and Rules Concerning the Interstate Interexchange Marketplace	
Implementation of Section 254(g) of the Communications Act of 1934, as Amended	CC Docket No. 96-61

To: The Commission

REPLY COMMENTS
OF SOUTHWESTERN BELL MOBILE SYSTEMS, INC.

Southwestern Bell Mobile Systems, Inc. ("SBMS") hereby submits these Reply Comments in response to the Oppositions filed by the State of Alaska ("Alaska") and the State of Hawaii ("Hawaii"), and in support of the Petitions for Reconsideration and Forbearance filed by the CMRS Petitioners[1] in the above-captioned proceeding. Those Petitioners sought reconsideration of that portion of the Commission's First Memorandum Opinion and Order on Reconsideration indicating that Section 254(g) and the

[1] Petitions for Reconsideration and/or Petitions for Reconsideration and Forbearance were filed by AirTouch Communications ("AirTouch"), Bell Atlantic Mobile, Inc. ("Bell Atlantic"), BellSouth Corporation ("BellSouth"), the Cellular Telecommunications Industry Association ("CTIA"), the Personal Communications Industry Association ("PCIA"), PrimeCo Personal Communications, L.P. ("PrimeCo"), and Telephone and Data Systems, Inc. ("TDS").

Commission's rate integration rules applied to CMRS carriers. In the alternative, the CMRS Petitioners requested the Commission to forebear from enforcing any rate integration requirements that might apply to CMRS carriers.

1. The Commission's Application of Rate Integration to CMRS Carriers Was Procedurally Defective and Lacks a Statutory Basis

SBMS supports the arguments of Bell Atlantic, BellSouth and PrimeCo regarding the procedural defects in the Commission's imposition of rate integration on CMRS carriers.[2] Hawaii and Alaska contend that Section 254(g) by its terms should have informed CMRS providers that the Commission's rulemaking could subject them to rate integration.[3] Assuming arguendo that Section 254(g) is as clear as Alaska and Hawaii contend, the statutory provision does not relieve the Commission of its obligation under the Administrative Procedure Act ("APA") to provide notice that its rulemaking would extend to CMRS providers.[4] Indeed, given the surprise expressed by virtually every major CMRS provider that the Commission contemplated applying rate integration obligations to CMRS providers, it is clear that the Commission did not provide the notice required by the APA

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[2] Bell Atlantic Petition 4-6; BellSouth Petition 6-15; PrimeCo Petition 6-11.

[3] Alaska Opposition 7-9; Hawaii Opposition n.17.

[4] American Transfer and Storage Co. v. ICC, 719 F.2d 1283, 1303 (D.C. Cir. 1983) ("The proper test is whether the notice would fairly apprise interested persons of the subjects and issues the agency was considering.").

as to the scope of the proceeding.[5] Further, given the facts and arguments advanced in those petitions, it is clear that the Commission has not compiled a record sufficient to permit it to apply rate integration to CMRS carriers.

SBMS also agrees with the numerous petitioners who observed that, even if the Commission were to follow the APA in applying its rate integration rules to CMRS, the application of those rules to CMRS still would be unlawful.[6] The legislative history makes clear that Congress intended Section 254(g) of the Communications Act to codify pre-existing Commission rate integration policies and those policies were not applicable to CMRS. Accordingly, applying rate integration requirements to CMRS exceeds the authority conferred by Section 254(g) and is unlawful.[7]

2. Even If Section 254(g) Does Permit the Commission To Apply Rate Integration to CMRS Carriers, the Commission Should Forbear From Enforcing Those Requirements

If the Commission decides to ignore Congress' intent in enacting Section 254(g) and concludes that Section 254(g)

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[5] See Stein et al., Administrative Law § 15.03[2] ("Where the comments have failed to deal with the substance of the final rule, the courts have determined that the notice was inadequate.").

[6] AirTouch Petition 6-13; Bell Atlantic Petition 9-11; BellSouth Petition 506; CTIA Petition 2-8; PrimeCo Petition 11-21; TDS Petition 3-4.

[7] The Commission also cannot support the application of rate integration requirements on CMRS under Sections 201 and 202 of the Act. The notice of proposed rulemaking did not purport to rely on those provisions, and the Commission did not make any findings that rate integration was necessary to protect the public interest. See In re Policy and Rules Concerning the Interstate, Interexchange Marketplace, Notice of Proposed Rulemaking, 11 FCC Rcd. 7141, ¶ 64 (1996) (hereinafter "Rate Integration NPRM").

applies to CMRS carriers, the Commission nevertheless should, as numerous petitioners have argued,[8] forbear from applying rate integration to CMRS carriers.

Section 10(a) of the Communications Act requires forbearance whenever enforcement is unnecessary to protect consumers and certain other related conditions are met. Nothing in the oppositions of Alaska and Hawaii, and nothing elsewhere in the record, provides any evidence that consumers have been harmed by the absence of rate integration requirements on CMRS providers since CMRS was inaugurated more than a decade ago. To the contrary, competition among CMRS providers offers consumers in each market unique pricing and service options designed to meet the needs and demands of the local market -- options which rate integration will reduce, if not preclude. As the Commission has recognized in numerous decisions, consumers are best served by a competitive market which fosters pricing and service flexibility, such as that which exists in the CMRS industry.

Creating a new, massive, burdensome, anticompetitive regulatory regime to solve a nonexistent problem is wholly contrary to the "pro-competitive, deregulatory national policy framework" for the United States telecommunications industry that was established in the Telecommunications Act of 1996. As Chairman Kennard observed during his recent press conference: "We should only regulate when it's

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[8] Bell Atlantic Petition 15-21; CTIA Petition 8-11; PCIA Petition 4-7; PrimeCo Petition 21-25; TDS Petition 4-5.

necessary to promote competition and protect the public interest." There is nothing to indicate that any regulation is required here; indeed, as Bell Atlantic has noted, the Commission has already found that forbearance is appropriate with respect to the regulation of CMRS rates, and rate integration is a form of rate regulation.[9] Thus, the reasoning underlying that holding applies equally to rate integration.

3. If It Concludes that Section 254(g) Should Be Applied to CMRS Carriers, the Commission Should Clarify that the Rate Integration Requirements Apply Only to Interstate Calls for Which a Separate Charge Is Imposed

If the Commission concludes that the rate integration requirements of Section 254(g) apply to and should be enforced against CMRS carriers, it should clarify that those requirements apply only to interstate calls for which a separate charge is assessed. As Alaska and Hawaii concede, the Act defines toll calls as calls for which there is a separate charge,[10] and Section 254(g) applies only to interstate, interexchange, toll calls.[11] Consequently, the

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[9] Bell Atlantic Petition at 18-20.

[10] Section 3(48) of the Act defines "telephone toll service" as "telephone service between stations in different exchange areas for which there is made a separate charge not included in contracts with subscribers for exchange service." (emphasis added).

[11] Alaska Opposition 15 ("Interstate CMRS calls for which there is not a toll charge may not properly be subject to rate integration requirements because they are not considered interexchange calls."); Hawaii Opposition 22 ("the rate integration requirement of Section 254(g) should apply to those CMRS calling plans that possess a toll service charge (direct or hidden) separate from local airtime").

rate integration requirements would not apply to calls within a wide-area integrated CMRS system encompassing several separately licensed CMRS systems, even where the calling area encompasses portions of more than one state, as long as there is no separate toll charge.[12] Clearly, the Commission does not intend there to be a complete restructuring of CMRS pricing nationwide, with new costs and burdens borne by carriers and, even more importantly, with new charges imposed on CMRS customers. That would, however, be the result of a decision to apply the rate integration requirements to interstate calls within wide-area, multistate calling scopes.

Similarly, as Alaska and Hawaii also concede, the Commission must modify its affiliation rules in light of the widespread cross-ownership in the CMRS industry.[13] As the CMRS petitioners have shown, and as Alaska and Hawaii admit, application of the current affiliation definition would result in extensive uniformity in toll rates among CMRS systems as a result of the intricate inter-relationships between CMRS carriers. SBMS urges the Commission, if it concludes that rate integration should apply to CMRS

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[12] This situation, of course, exists throughout the country. As a local example, SBMS's Cellular One system in the Washington/Baltimore market encompasses 3 states and the District of Columbia, combining 2 MSA licenses and 4 RSA licenses in a single system within which no toll charges are imposed.

[13] Alaska Opposition 14 ("the State does not object to a clarification with respect to the application of the rate integration requirements to CMRS providers that are controlled by more than one ultimate parent company and those parent companies are not otherwise commonly controlled"); Hawaii Opposition 24 ("a limited modification of the 'affiliate' definition may be appropriate").

providers, to narrow the scope of any rule so that separately-owned (even if commonly-controlled) CMRS systems are not subject to rate integration obligations.

4. Consumers in Alaska, Hawaii and Other Offshore Points Should Be Protected Through Narrowly-Tailored Rate Integration Rules

Although there is no evidence in the record in this proceeding that consumers have ever been harmed by the lack of a rate integration rules for CMRS carriers, SBMS is aware that the Commission's rate integration policies have their genesis in the integration of Alaska and Hawaii into the domestic rate structure.[14] Indeed, the only parties arguing on reconsideration that rate integration should be imposed on CMRS providers are those two States. If the Commission concludes that CMRS consumers in those States and other rate-integrated offshore points should be protected against excessive rates for CMRS interstate calls to and from the contiguous 48 states, those concerns can and should be addressed through narrowly-tailored CMRS rate integration rules, rather than the overbroad and burdensome rules that the Commission has suggested may be applicable to CMRS carriers.

Specifically, the Commission could forebear from enforcing the rate integration rules for interstate calls within the contiguous 48 states but require that Alaska, Hawaii, and other offshore points be treated in the same

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[14] Rate Integration NPRM ¶¶ 74-75.

manner as calls between points within the contiguous 48 states. Thus, if a CMRS carrier provides toll service at a postalized rate within the contiguous United States, the same postalized rate should apply to calls to Alaska, Hawaii, and other offshore points. If a CMRS carrier charges for toll service on a mileage or banded basis, the rate integration principles applicable to landline calls to Alaska, Hawaii and other offshore points should apply to the CMRS carrier's rates.[15]

Under this approach, CMRS carriers should not, however, be required to charge the same interstate rates across affiliates and across service areas within the contiguous 48 states. The same CMRS carrier which uses postalized toll rates should, in response to competitive and other conditions, be able to charge Chicago customers one per minute rate to call all domestic points, including Alaska, Hawaii, etc. and to charge St. Louis customers a different per minute rate to call all domestic points, including Alaska, Hawaii, etc. Using this approach, Alaska and Hawaii would be integrated into the U.S. interstate interexchange calling system without stifling competition within the contiguous United States.

Adopting the position advanced by Alaska and Hawaii and requiring CMRS providers to charge the same rates for all interstate interexchange calls in all the markets in which

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[15] In re Policy and Rules Concerning the Interstate, Interexchange Marketplace, First Report and Order, 11 FCC Rcd. 9564, ¶ 52 (1996).

they operate would chill competitive responses to market demands in different CMRS markets within the contiguous states in order to protect an important, but nonetheless limited, segment of the population. It would have the tail wag the dog. The key to protecting the interests of residents of Alaska, Hawaii and other offshore points is that the cost of a call to those non-contiguous sites should be integrated into the rate structure for calls within the contiguous United States. The proposal advanced here achieves that goal and does so though a more focused and targeted approach than the blunderbuss approach advocated by Alaska and Hawaii.

Conclusion

For the reasons set forth above, the Commission should not subject CMRS carriers to rate integration or, in the alternative, subject them to only rate integration rules that are narrowly-tailored to protect offshore points by requiring that such points be treated in the same manner as other calling points.

Respectfully submitted,

SOUTHWESTERN BELL MOBILE SYSTEMS, INC.

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November 10, 1997

CERTIFICATE OF SERVICE

I, Patrick J. Grant, an attorney in the law firm of Arnold & Porter, hereby certify that on this 10th day of November 1997, copies of the foregoing "Reply Comments of Southwestern Bell Mobile Systems, Inc." were served by mail on:

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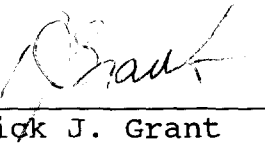

Patrick J. Grant

Attachment A

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